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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992:	)	MM Docket No. 92-266
	)	
Leased Commercial Access	)	CS Docket No. 96-60

REPLY COMMENTS OF
THE INTERNATIONAL CABLE CHANNEL PARTNERSHIP, LTD.

The International Cable Channel Partnership, Ltd. ("ICCP") submits these reply comments to focus on the unintended consequences of the Commission's leased access proposal on newly-developing niche programming services such as the International Channel. In an attempt to foster diversity, the Commission's proposal will have a serious adverse impact on such services and the diversity which they offer to viewers.

I. The Commission's Valuation Proposal Drastically Understates The Value Of Leased Access Channels, Particularly When Based On The Proposed Deletion Of Niche Services.

As ICCP explains in its comments at 2-3, the Commission's proposed methodology for valuing leased access channels does not include an essential element of that value -- the impact of programming services on subscriber demand for cable service or particular tiers of service. ICCP's strategy of providing "basic lift" to cable systems by strongly appealing to specific demographic segments of the subscriber population is a key element of its value to cable operators. The International Channel is a multilingual video programming service

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providing educational and entertainment programming in twenty-three different Asian, European and Middle Eastern languages. Thus, the International Channel provides a bridge between these unserved or underserved minority and ethnic groups and other cable programming services. By limiting its valuation approach only to the services to be deleted for leased access, the Commission's proposal exacerbates this undervaluation.[1]

The comments of cable operators and industry experts confirm that such impact on subscriber demand is an essential element of the value of niche programming services such as the International Channel. Cable operators exercise their editorial discretion to develop an appropriate mix of popular well-known cable networks with mass appeal and a variety of niche channels which strongly appeal to smaller demographic subscriber segments. See Continental Comments at 13-16; Comments of Tele-Communications, Inc. ("TCI") at 12-14; Stanley M. Besen & E. Jane Murdoch, "The Impact of the FCC's Leased Access Proposal on Cable Television Program Services" ("Impact of FCC's Leased Access Proposal"), annexed to Joint Comments of Turner Broadcasting System, Inc., News Corporation, Ltd., and C-SPAN, at 3-5.

Niche programming services such as the International Channel play an increasingly important role in adding and retaining cable subscribers:

> [N]ew launches today are typically directed towards relatively small "niche" markets. The reason is that extensive video programming is already available to

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[1] As ICCP had anticipated in its comments at 3, subsidized leased access rates would have a disproportionate adverse impact on more recently-launched programming services, especially niche services like the International Channel. See Comments of Continental Cablevision, Inc. ("Continental") at 20-21 ("[t]his would, ironically, delete from the channel line-ups some of the more interesting and truly 'diverse' programming available today, and replace it with what in most cases consists of low budget infomercials and advertising"). As ICCP also noted in its comments at 3, the calculation of leased access value solely based on these services, which have not achieved their maximum revenue-generating potential, will further understate such value.

> meet the requirements of the "market as a whole"....This creates a natural economic incentive for programmers to look for viable (i.e., unserved) niches of consumer interest. Finding and serving these niches is the essence of programmers' creative activity. It is how they create value in the marketplace that will eventually support their programming.

Affidavit of Robert A. Stengel ("Stengel Aff."), annexed as Attachment 1 to Continental Comments, at ¶19. As explained by Camille Jayne, Senior Vice President of TCI's Digital TV Strategic Business Unit, such niche services provide highly-valued "basic lift:"

> Research demonstrates that niche programming services are particularly valued by customers in making purchase decisions. The ability to balance broadbased, mass audience programming with niche-oriented, diverse programming is one of the key components to the value of the cable system's offering.

Affidavit of Camille Jayne, annexed as Attachment F to TCI Comments, at ¶5; see A. Daniel Kelley, "An Economic Analysis of Commercial Leased Access Pricing" ("Economic Analysis"), annexed to Comments of Time Warner Cable ("Time Warner") at 9 n.17.

Consequently, the failure of the Commission's proposed valuation methodology to include any measure of the impact of programming services, particularly niche services, on subscriber demand causes that methodology to grossly understate the value of leased access channels.[2] TCI's comments underscore this fundamental flaw in the Commission's valuation methodology. The International Channel is one of five programming services tentatively

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[2] As ICCP noted in its comments at 3-4, a formula which assigns no value to channel capacity increases the exposure of cable programmers and operators to deletions for short-lived leased access programming efforts. Based on its experience with leased access programmers, Time Warner observed that:

> The vast majority of CLA programmers are part-time with very high churn rates (i.e., CLA programmers generally do not stay in business very long and, therefore, do not provide a reliable program source upon which consumers can establish viewing patterns and program loyalty).

Time Warner Comments at 32.

designated for deletion to accommodate leased access in TCI's Seattle system. See Attachment E to TCI Comments. Using the Commission's proposed valuation formula, TCI calculates a monthly leased access rate of nearly negative $.10 per subscriber per channel. TCI Comments at 14-15. This anomalous result, if an accurate measure of value, would suggest that TCI should not be carrying these services in the first place However, a survey of 302 subscribers in the Seattle system shows that subscribers substantially value the same five channels to be deleted, including the International Channel. See "Leased Access Programming Issues Survey," annexed as Attachment G to TCI Comments. Thus, 81 percent of the subscribers would be "very angry" or "pretty angry" if the Seattle system deleted the International Channel and other services to accommodate leased access; 82 percent would view the change as "substantially" or "very substantially" lowering the value of their cable service; 44 percent would "definitely" or "probably" drop their cable TV service; and 76 percent would "definitely" or "probably" switch to another multi-channel video programming distributor if available. Id. at 5-6.

This significant impact on subscriber demand directly affects cable operator revenues and cannot be ignored in valuing leased access. For example, based on its average 56-channel system, Continental calculates that a decline in subscribership of less than 2 percent would yield a net loss of revenue to the cable operator "even if the leased access provider is paying a fully compensatory cost-based rate and even if the cable operator retains 100 percent of subscriber revenues." Continental Comments at 10. A loss of only 1 percent of a system's basic subscribers corresponds to a monthly value of roughly $.21 per subscriber in a typical Continental system. Id. at 11, Attachment 3; see "Economic Analysis" at 19-20. Such revenue losses may result in a broader "cascade" effect because the cable operator would have less cash flow to invest in other programming, thereby potentially incurring additional subscriber losses.

Clearly, the impact of niche programming services such as the International Channel on subscriber demand is an important element of the value of channel capacity.

II. Mandatory Preferential Carriage Of Leased Access Services Would Confer An Additional Subsidy And Unfair Competitive Advantage Upon Leased Access Services.

ICCP's presentations to cable operators are not directed solely at obtaining carriage on their systems -- carriage on attractive tiers of programming services and in complementary "neighborhoods" are important elements of affiliation negotiations. Industry experts explain a cable operator's program packaging function and its importance to niche programmers such as the International Channel as follows:

> Cable systems offer subscribers a number of diverse services together on a tier rather than providing the services à la carte because doing so increases the value of the cable television product. Although customers may initially subscribe to gain access to only a subset of program services, tiering creates an opportunity for lesser known services to introduce their programming to subscribers and to increase their viewership over time. Consumers benefit because they learn about and watch programming to which they otherwise would not have been exposed. Advertisers on cable program services reach larger audiences, which results in larger payments to program services for advertising spots. A significant element of the value created by a cable operator thus involves the selection of the programs that comprise its line-up

"Impact of FCC's Leased Access Proposal" at 3-4 (note omitted). A cable operator may create "clusters" or "neighborhoods" of programming to provide subscribers dependable viewing destinations. Id. at 4-5. In short, such packaging creates value to programming services "because of the spillover of audiences among program services." Id. at 6.

Mandatory carriage of leased access channels on basic or widely-distributed cable programming service tiers ("CPSTs") allows such services to "free-ride" on the quality of other programming services. "Impact of FCC's Leased Access Proposal" at 6-7. Because the cable operator has no editorial control over leased access, such services may take advantage of the programming and promotional efforts of the other services on the tier. Thus, even programming services which are not displaced for leased access carriage are harmed because of the diminution in "positive spillovers" among tiered programming services resulting from leased access free-riders. Id. at 17-20. Of course, as a practical matter, there also are limits to the number of channels on a given tier. To the extent that the Commission mandates carriage of leased access channels on basic or widely-distributed CPSTs, it is precluding the carriage of other services on such tiers.

The Commission's mandatory carriage requirement runs directly counter to the "promotion of competition" among programming services, which is an express purpose of leased access under 47 U.S.C. §532(a). See Comments of the Cable Programming Coalition of A&E Television Networks, the Courtroom Television Network, NBC Cable and Ovation ("Coalition") at 13-15; Comments of Outdoor Life Network, Speedvision Network, The Golf Channel, and BET on Jazz ("Outdoor Life, et al.") at 27-28. As ICCP noted in its original comments at 5, a "genuine outlet" for leased access does not mandate such carriage. A leased access tier technically available to subscribers and subject to the anti-buy through requirements of 47 C.F.R. §76.921 enables fair competition among programming services for carriage on desirable channels. See Comments of ESPN, Inc. at 9-10

III. If The Commission Substantially Revises Its Leased Access Rules, It Should Provide Transitional Relief To Cable Operators, Programmers, And Subscribers.

The record in this proceeding confirms that an increase in the demand for leased access resulting from subsidized leased access rates would require deletions of numerous channels on cable systems throughout the United States. The disruption to subscribers and cable operators would be severe and potentially immediate -- subscribers, as documented in the subscriber surveys in the record, would be unable to view desired programming, and, notwithstanding long-term programming commitments, cable programmers would face reduced carriage.[3] In the context of a universally-acknowledged shortage of channel capacity, programmers would have little opportunity to recoup lost carriage and subscribers, much less any realistic prospect for continued growth.

In order to minimize the adverse impact of such disruption on programming diversity, the Commission should adopt reasonable transition rules. For example, ICCP suggested a multi-year transition period. See ICCP Comments at 5. Other programmers have suggested that the Commission grandfather the carriage of existing services,[4] establish a bifurcated rate formula for vacant channels as distinguished from channels requiring deletions,

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[3] ICCP shares the concerns expressed by other programmers that regulatory subsidies to leased access programmers which cause programming deletions raise serious issues under the First and Fifth Amendments to the Constitution. See, e.g., Outdoor Life, et al. Comments at 28-30; Coalition Comments at 40-53.

[4] ESPN explained the underlying rationale for a grandfathering approach as follows:

> Such an extension of the "grandfathering" approach adopted by Congress in 1984 clearly falls within the Commission's authority under Section 612(c)(4)(A)(ii) of the 1992 Act to establish reasonable terms and conditions for leased access use. Furthermore, it is essential in order to ensure that the effects of the Commission's revised "going forward" rules -- which allow and encourage operators to add new services to regulated tiers -- are not undone by exposing recently entered into business relationships to disruption.

ESPN Comments at 7; see Comments of The Travel Channel at 19-21 (preclusion of deletion until expiration of existing carriage agreements).

or other transition alternatives. See ESPN Comments at 7; Coalition Comments at 58; Outdoor Life, et al. Comments at 37-38.

Likewise, the Commission should not require the deletion of existing programming services for part-time leased access channels. See Coalition Comments at 59-60; Outdoor Life, et al. Comments at 30-33; TCI Comments at 33-34; Comments of Cox Communications, Inc. at 24-25. To do otherwise would sacrifice programming diversity to accommodate leased access programmers in a way that is contrary to the interests of subscribers and clearly was not contemplated by Congress. As the Travel Channel explained in its comments:

> Bumping would be disruptive, serve no useful purpose, and would result in consumer confusion and welfare losses as valued channels are removed from the system and replaced by lower quality programming which consumers do not value.

Travel Channel Comments at 20. It would be particularly inappropriate to incur these kinds of consumer welfare losses for part-time leased access programming.

Conclusion

Although niche programming services such as the International Channel provide the very kind of programming diversity sought by Congress and the Commission, the Commission's proposal would severely limit the International Channel's opportunities for cable carriage and greatly reduce its level of existing carriage. The stark example provided by TCI's Seattle system could not be clearer -- notwithstanding subscriber demand for the International Channel and the other services to be deleted, the Commission's valuation methodology yields a negative leased access charge. This result suggests that the Commission's valuation proposal is misguided and will yield results which are contrary to the public interest. ICCP respectfully requests the Commission to withdraw and reconsider the essential elements of its proposal.

May 31, 1996

Respectfully submitted,

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